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IN THE

Supreme Court of the United States

No. 289.

MARION H. ALLEN, Collector of Internal Revenue,
Petitioner,

v.

TRUST COMPANY OF GEORGIA and HUGHES SPALDING, Executors of the Estate of **JACK L. SPALDING**, Deceased,
Respondent.

RESPONDENT'S BRIEF.

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TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK L. SPALDING, DECEASED,

Respondent.

RESPONDENT'S BRIEF.

Respondent's contentions and the points of departure between the position of petitioner and respondent can readily be developed and elucidated by dealing directly with petitioner's Specification of Errors. The Specification of Errors advance three grounds of objection to the decree. In the presentation of respondent's argument, the specification of errors will be rearranged and renumbered in the order of their respective importance. The specification of each alleged error will be stated seriatim, followed by a statement of respondent's position, in lieu of a summary of respondent's argument.

PETITIONER'S SPECIFICATION OF ERRORS AND SUMMARY OF RESPONDENT'S POSITION.

(1) "(3) In failing to hold that the respondents had not sustained the burden of proof resting upon them to show that the relinquishment in question was not made in such contemplation."

The question here presented is one of fact and is the controlling question in the case. Under the facts found by the Trial Court, the burden of proof was fully carried by respondent. These facts were reviewed by the Circuit Court of Appeals and expressly approved. That Court said:

> "All finding of facts from 7 through 13, inclusive, have substantial support in the evidence. Finding No. 14 to the effect that the renunciation of the power to amend, executed on May 1, 1937, 'was not made in contemplation of death in the statutory sense,' is supported by the circumstances and facts in evidence insofar as the actualities are concerned. * * *"

The case is controlled by the rule announced in *United States v. Wells*, 283 U. S. 102, 120, wherein this Court, in affirming the judgment of the Court of Claims, said:

> "In the presence of such a motive appropriately found and of the underlying facts which have been expressly found, there would be no ground for a reversal of the judgment merely because of an inaccuracy in the general statement as to the meaning of a statutory phrase."

Regardless of any inaccuracy of statement by the Court below as to the meaning of the "statutory phrase" "in contemplation of death", the decree in this case should be affirmed upon findings of fact of the Trial Court, and the underlying facts supporting those findings.

(2) "(1) In holding that a relinquishment of a power to amend, change, enlarge or limit a trust, reserved therein by the decedent, was not made by him in contemplation of his death within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended, even though in making it the decedent was motivated solely by a purpose to prevent the inclusion of its corpus in his gross estate at his death in order to avoid the additional estate tax resulting from such inclusion."

That statement of alleged error is merely a statement in a narrower form of the factual proposition involved in grounds No. 1 above, and the two specifications of error may be treated together. In that statement of the Specification of Errors, petitioner omits from consideration relevant and controlling facts and circumstances surrounding the execution of the original transfers that influenced the Trial Court in reaching the ultimate conclusion of facts that the gifts were not made "in contemplation of death." The Trial Court gave consideration to the facts and circumstances surrounding the creation of the trust and the inducing cause for making the same, as well as the facts and circumstances surrounding the relinquishment of the powers. The inducing motive for establishing the trusts, the reasons why the trusts were in that particular form, the legal effect of the trusts as originally executed as understood by the settlor, were all vital and relevant matters to be considered in connection with the release of the powers in determining settlor's motive in making the gifts. The District Court, sitting as the trior of the facts, treated the establishment of the trust and the relinquishment of the powers "as steps in an integrated transaction" in determining the donative intent of the settlor. The position of petitioner denies to the District Court the right to so treat the transaction and seeks to have this Court as a matter of law to hold that the relinquishment of the powers and the creation of the trust are totally unrelated and cannot be viewed together in determining settlor's motive in making the gifts.

(3) "(2) In holding that a relinquishment so motivated was not made in contemplation of his death unless the decedent deemed death to be near at hand."

That specification of error is immaterial if, as a matter of fact, the judgment is otherwise correct in the light of the findings of the Trial Court. *United States v. Wells, supra.*

The specification also becomes immaterial in view of the findings of fact by the Trial Court, to-wit:

> "However, in making such releases Mr. Spalding was actuated by the thought of death only to the extent that thoughtful men habitually act with regard to ultimate death, and he did not in 1925, 1934, and 1937 entertain thoughts of death except the general expectation of death that all entertain." (R. 123, 124.)

The facts found to be true by the District Court satisfies the requirements of the rule when correctly stated. "It is recognized that the reference is not to the general expectation of death which all entertain." (*United States v. Wells*, 283 U. S. 102, 115.)

Petitioner's admissions in its Brief, page *, makes the question immaterial:

> "While the decedent was 81 years of age at the time he released the power, the Government does not claim that he was motivated in doing so by any fear or expectation of death induced by his age or by the condition of his mind or body."

A substantial part of petitioner's brief is devoted to a discussion of a point that cannot control or affect the outcome of this case in view of the findings of fact and admission in petitioner's brief.

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* Typewritten copy served on Respondent.

ARGUMENT.

The facts found by the trial court sitting as a jury are amply supported by the record.

(a) The Circumstances Under Which the Trusts Were Established.

The record shows that settlor was a man of integrity and distinction. He received the Notre Dame award of the Laetare Medal in 1928 and was knighted by his Church for his religious and charitable work. In addition to his business and legal activities, he actively participated in church, public and charitable affairs until just a few months before his death. He was a delegate to the National Democratic Convention at Chicago in 1932 and again in 1936 at Philadelphia, and took an active part in its proceedings. He led the fight against Talmadge rule in Georgia, and on August 15, 1936, just fourteen days before his eightieth birthday, he made a vigorous speech that the press characterized as the "Death Knell of Talmadgeism in Georgia." In May, 1937, he attended the Kentucky Derby, driving there by automobile, and on his eighty-first birthday he attended a meeting of the Society of St. Vincent de Paul at St. Paul, Minnesota, traveling by automobile. He was elected President of the Atlanta Historical Society in July, 1936, and remained its head until January, 1938. During his presidency the membership of the Society increased five-fold.*

No claim is made that the creation of the original trust or the relinquishment of the power was influenced by any special thought of death. It is admitted that the trusts were created for the purpose of relieving the distress of settlor's children and to equalize gifts among them.

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* A resumé of settlor's activities during the later years of his life may be found in the black bound scrap book, which was sent up as part of the record as a physical exhibit.

He always made gifts to his children on the principle of equality. (R. 57, 121.)

In 1912 he made a gift of a home to his son Hughes and to his daughter Suzanne of the value of $15,000, and soon thereafter gave stock of equal value to his son Jack. (R. 121.) In 1918 he made another gift of $18,000 either in cash or its equivalent to each of his children (R. 122). These gifts were outright and the property was delivered to each child.

Settlor's daughter Suzanne lost her money in an oil mill venture with her husband. As a result, she was without means. She was in debt jointly with her husband to the extent of $86,000. Her husband was without employment and they had five minor children to support.

His son Jack had lost his money and settlor had put him on a monthly allowance.

The trust instruments were set up to meet the needs of Suzanne and her children and Jack and his family. In order to protect Suzanne and Jack "against their own business misadventures and not to retain any benefit directly or indirectly to himself, the gifts were put in trust and not delivered to them because of past experience in handling prior gifts." (R. 123, Finding 8.)

In creating the trusts, he believed that he had adopted and settlor intended to adopt an instrument "that passed title to the trust property absolutely out of him for all purposes, including estate taxes." (R. 123, Finding 9.) Believing that he had made absolute and completed gifts he paid gift taxes upon the full value of the gifts.

In his letter of June 15, 1925, to his daughter Suzanne, settlor sent a copy of the trust agreement, telling her that the "trust will yield you $300.00 a month for living money and you will see that after your death it will be administered and paid over to your children until the youngest becomes twenty-one years of age, when it will be equally divided between them. If any misfortune should take off the five fine children you now have and you have no other

left at your death, it will then be in your power to provide in advance by making a will disposing of the corpus of this fund to whomsoever you please." (R. 62, 63.)

A letter of similar import was written to Jack on the same day.

No mention in these letters was made of the powers reserved in the trust, as settlor no doubt considered the reservation of the powers without legal significance.

When the trusts were enlarged in 1934, settlor's son Hughes was financially embarrassed. Hughes had purchased real estate in Miami for $60,000, the value of which had been destroyed by a hurricane which blew away the bulkheads causing the land to be washed back into the bay. (R. 69.) He had purchased real estate in Fulton County that cost him $112,000 and was heavily involved in the stock market. He was caught in the panic that began in 1929 and continued through the early thirties. The settlor gave to his son outright $50,000 in money or its equivalent and purchased from him his Fulton County property for $90,000, all of which was applied on Hughes' debts. (R. 68.)

Settlor was amply able to give to his son Hughes sufficient funds to meet his financial needs. Instead of that he gave him only $50,000 and purchased from him real estate in the amount of $90,000. This real estate was owned by settlor at the time of his death and was returned for estate taxes. The size of this gift was limited to the amount Hughes needed to meet his obligations.

Settlor held an unusual view about his own wealth. He was a man of great business sagacity but he never wanted to be worth over a Million Dollars. He made large distributions to charity in equal or in greater amounts than the gifts to his children. (R. 79, 123.) At his death, exclusive of the property in dispute, his estate for estate tax purposes was valued at approximately a million dollars. (R. 86.) *

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* See Findings of Fact 5, 7, 8, 9. R. 121, 122, 123.

(b) Circumstances Under Which Powers Were Relinquished.

J. J. Haverty, a client of settlor's law firm, desired to make gifts in trust to his children and grandchildren and "pass his complete title out" (R. 77) and consulted for that purpose settlor's son and law partner, Hughes Spalding. Settlor's son Hughes, knowing Haverty's desire to make completed gifts to his children and grandchildren, used the form of trust instrument that settlor had employed in making the gifts to his daughter Suzanne and his son Jack—reserving therein the identical powers now under review. He adopted that form of instrument for the Haverty trust "thinking it was airtight and had accomplished the purpose" (R. 77), the purpose being to make an absolute and completed gift. It was Hughes Spalding's legal opinion that the reservation of such powers did not "in anywise keep the trust from being a completed gift." His law firm and settlor held the same opinion at the time the Spalding trust was established in 1925 and enlarged in 1934. (R. 65; 63.)

The First National Bank of Atlanta was named Trustee under the Haverty trust and when the trust instrument was delivered to the Trustee, the Trust Officer called Mr. Hughes Spalding's attention to *City Bank and Farmers Trust Company v. Commissioner,** and as expressed by Mr. Hughes Spalding "that in this Haverty case what we thought the law was, was not the law." (R. 77.)

When Mr. Hughes Spalding was faced with the proposition that he had misapprehended the legal effect of the transfers, he immediately by letter called the attention of his client to the mistake and proceeded to "get the thing straightened out." (R. 77.)

In that letter to his client of April 22, 1937, Mr. Hughes Spalding said that "the instruments creating the gifts would fail to take these gifts out of your general estate."

* 296 U. S. 85.

(R. 77.) He recommended that the reserved powers be relinquished and set out in the letter a form of relinquishment. (R. 78.)

A copy of that letter from Hughes Spalding to Mr. Haverty with this notation at the bottom was placed on the desk of settlor:

> "The contents of this letter will interest you. I prepared the trust for Mr. Haverty, using the ones you had prepared in connection with Jack and Suzanne. The same provisions are in those trusts and you may wish to amend them."

"Promptly thereafter, on May 1, 1937, settlor relinquished the powers reserved in the trust instrument." (R. 79, 13.)

Regarding settlor's motive for the release, the Trial Court stated:

> "He made the release, not because he had in mind thereby to effect substantially a testamentary disposition in a different form, but because he desired to take the property out of his estate as he thought he had already done. He was not contemplating his death, except in the general sense, *but was motivated by what he considered a change in the law*, and made the release to effect his original intention without regard to when his death might occur." (R. 118.)

Likewise the Court expressly found:

> "13. He was motivated in making the gifts by his desire to meet the necessities of his children and to set aside property solely for the benefit of them and their families, freed of all claims, tax and otherwise, and the release of the power on May 1, 1937, falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934." (R. 124.)

(c) The Gifts Were Complete and Absolute as the Law Was Construed When the Trusts Were Created.

At the time the trusts were created in June, 1925, and enlarged in August, 1934, the Bar generally, the settlor and his law firm held the view that a trust instrument embracing the terms set out in the Spalding trusts conveyed absolute and complete title.

Under the rule announced in *Reinecke, Collector v. Northern Trust Co.*, 278 U. S. 339, the reservation of such powers did not diminish the absolute and unqualified nature of the transfer.

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

The Board of Tax Appeals accepted the rule announced in *Reinecke, Collector v. Northern Trust Company,** *supra*, as controlling under the later Revenue Acts as did the Circuit Courts of Appeals.

In *City Bank & Farmers Trust Co. v. Commissioner*, 296 U. S. 85, trusts such as settlor's trusts were held not to convey completed gifts; such transfers became complete and absolute only upon the relinquishment of the powers.

It is admitted and the Trial Court found the facts to be that the settlor executed the original transfer under a misapprehension as to the legal effect of the trust instrument and that when the trusts were established settlor intended to make absolute and completed gifts to his children and that he believed the form of conveyance used by him accomplished that purpose. Settlor remained under that mistaken view until the decision in the *City Bank and*

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*City Bank & Farmers Trust Co., Trustee, v. Commissioner, 29 B. T. A. 1141, 1144 (Feb. 21, 1934); affirmed.

Farmers Trust Co. v. Commissioner, supra, was brought to his attention. Immediately thereafter settlor amended the trust instrument to carry out his original intention, that is, to make the gifts absolute and complete to his children and grandchildren, as he thought he had already done.

Respondents conceded that a second gift tax became due when the power was released, although when the transfers were originally made a gift tax was paid by the settlor upon their full value.

Under these and other facts in the record the District Court found the case to be one in which the Settlor, motivated solely by a desire to help his children, made what he thought and intended to be absolute and completed gifts to them and thereafter finding that because of a change in the decisional law settlor had misapprehended the legal effect of the instrument, he amended the instrument to speak his original intention. The District Court found the facts to be:

> "8. The gifts of June 15, 1925, and August 26, 1934, were made by Mr. Spalding to meet the pressing necessities of some of his children and to equalize the gift to others and out of the desire to relieve the needs and to make secure the maintenance of his children and the education and support of his grandchildren. The gifts were put in trust and not delivered to the children because of past experience in handling prior gifts. Suzanne and Jack had lost such gifts in unsuccessful business enterprises, and Mr. Spalding, in establishing the trusts, desired to protect them against their own business misadventures and not to retain any benefit, directly or indirectly, to himself.
>
> "9. At the time the trusts were created in June 1925 and enlarged in August 1934, Mr. Spalding believed that the gifts were complete and absolute and so intended, and that the trust property passed absolutely out of him for all purposes, including estate

taxes. Under the law as he then interpreted it, he was justified in that belief. He returned and paid gift tax upon the full value of the gifts in 1925 and 1934, and his intentions and purposes were to make the gifts absolute and complete." (R. 123.)

* * *

"12. Mr. Spalding made the releases of May 1, 1937 for the purpose of putting the trusts in the condition, which he had thought they were in when made, so that they would not be a part of his estate for estate tax purposes. However, in making such releases Mr. Spalding was actuated by the thought of death only to the extent that thoughtful men habitually act with regard to ultimate death, and he did not in 1925, 1934, and 1937 entertain thoughts of death except the general expectation of death that all entertain.

"13. He was motivated in making the gifts by his desire to meet the necessities of his children and to set aside property solely for the benefit of them and their families, freed of all claims, tax and otherwise, and the release of the power on May 1, 1937, falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934." (R. 123, 124.)

The facts as found by the Trial Court were expressly approved by the Circuit Court of Appeals upon a review of the Record. (R. 132.)

In the case at Bar, the Trial Court, in testing whether or not the transfer was made "in contemplation of death", gave consideration to the facts and circumstances under which the trust was created as well as the facts and circumstances under which the power was surrendered, and in determining Settlor's motive in making the gift viewed the creation of the trust and the surrendering of the power as several steps of an "integrated transaction" and not as several independent and unrelated transactions.

In treating the several steps—creation of the trust and the renunciation of the power—as an "integrated transaction", the Trial Court in the case at Bar acted with the approval and perhaps under the command of this Court in the recent case of *Dobson v. Commissioner*, 320 U. S. 489, 493, 502, 503.

The Tax Court in that case treated a series of transactions occurring over a period of years as an "integrated transaction" in determining tax liability, and so treating them reached the conclusion of no tax liability. The Circuit Court of Appeals reversed the Tax Court, holding that that Court was unauthorized to treat the several steps in the transaction as an "integrated transaction" and held that each step in the transaction should be looked at as a separate unit. So viewing the evidence, the Circuit Court of Appeals reached a different result from the Tax Court and found tax liability. This Court upheld the power of the Tax Court in determining the question of fact to treat the transaction as an "integrated transaction" in determining the question of liability. The underlying theory of this Court's decision is found in a series of very pointed statements, to-wit:

> "The Tax Court's inquiry as to past years was authorized if 'necessary correctly to redetermine' the deficiency. The Tax Court thought in this case that it was necessary; the Court of Appeals apparently thought it was not." (P. 493.)
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> • • •
>
> "Whether an apparently integrated transaction shall be broken up into several separate steps and whether what apparently are several steps shall be synthesized into one whole transaction is frequently a necessary determination in deciding tax consequences." (P. 502.)
>
> • • •
>
> "The Tax Court analyzed the basis of the litigation which produced the recovery in this case and the

obvious fact that 'regarding the series of transactions as a whole it is apparent that no gain was actually realized.'" (P. 503.)

• • •

"The error of the court below consisted of treating as a rule of law what we think is only a question of proper accounting." (Pp. 506-7.)

The method of the Trial Court in determining the evidence in the case at Bar not only finds support in the Dobson case but among the Circuits. In determining the question of motive, the Courts have considered the facts surrounding the inception of the gift as well as its consummation.

In *Denniston v. Commissioner*, 106 F. (2d) 925, the Court looked to the motive of the settlor in creating the trust, as well as the circumstances under which the transfer was consummated by the renunciation of the power, in determining whether the transfer was made "in contemplation of death."

In *Bradley v. Smith*, 114 F. (2d) 161 (C. C. A. 7, 1940), the Court looked at decedent's prior plan to test the question as to whether the transfer was made "in contemplation of death."

Likewise, in *Brown v. Commissioner*, 74 F. (2d) 281, (C. C. A. 10, 1934), the Court said:

"Since the motive for the gift dates back of the time it was consummated, the circumstances" of the consummation "are not so important • • •."

The Courts are fully agreed that transfers "in contemplation of death" present a question of fact for decision.

This Court, in *United States v. Wells*, 283 U. S. 102, 119, said:

"It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in 'contemplation of death', as there

can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances."

In *McCaughn v. Real Estate Company*, 297 U. S. 606, the District Court, sitting without a jury as in the case at Bar, found that the transfer was made "in contemplation of death."

The Circuit Court of Appeals, upon a careful review of the evidence, held to the contrary and reversed the District Court.

According to this Court, the only question that the reviewing Court could pass upon was "whether the Court's verdict was wholly without evidence to sustain it."

In reversing the Circuit Court of Appeals, this Court bluntly said:

> "The ultimate question for the decision of the Trial Court was one of fact and its general verdict was conclusive." (P. 608.)

The question of whether or not a transfer is made "in contemplation of death" is tested by settlor's state of mind. In *United States v. Wells*, U. S. 102, 117, 118, the rule is stated thus:

> "As the transfer may otherwise have all the indicia of a valid gift inter vivos, the differentiating factor must be found in the transferor's motive • • •. The question necessarily is as to the state of mind of the donor."

In this case, when the change in the decisional law was brought to settlor's attention, he did the thing and only thing that could effectuate his original purpose. He corrected the instrument. His state of mind had not changed in the meanwhile; his motive had not changed one iota. His motive originally was to protect his children by making a completed gift to them. It is conceded that he had a right to do that. In amending the instrument so as to give to it

the same legal effect he had intended it should have originally, settlor had no new or different motive or state of mind. The Trial Court so found.

As a matter of fact every completed gift *inter vivos* reduces the estate tax and incurs a lesser gift tax. The Congress so intended.

Every intelligent settlor will want to know the tax consequences of his transfer and is entitled to seek advice on that subject. Every careful lawyer will draw the conveyance, if consistent with settlor's purpose, in such manner as to avoid the estate tax on the property. If a lawyer should later discover his advice or draftsmanship was in error, he would so advise his client. If petitioner's position is sustained in this case, then if the client corrected the legal error, the transfer would thereafter be characterized as a testamentary disposition of property, notwithstanding the fact that the client was motivated solely by a desire in making the transfer to help his needy children and intended at the time to make a completed gift.

The Trial Court held that settlor, being motivated entirely by the "beneficent" purpose to help his needy children, had a right to choose the form of instrument that would avoid estate taxes and incur a gift tax and later when he discovered that he misconceived the legal effect of the instrument, he had a right to make the necessary corrections without changing the essential nature of the transaction.

In making the change, according to the Trial Court, settlor was not motivated by thoughts of death in surrendering the power but was "motivated by what he considered a change in the law * * *." (R. 118.)

In other words, the thing that motivated the release was the fact that settlor discovered that the legal effect of the transfer was different from what he thought it was at the time it was executed.

In making that correction settlor was not looking forward to death—he was looking backward to an incompleted

life transaction. Except for the fact that the life transaction was incompleted contrary to his expectation, he would not have relinquished the power.

The consequences of the original transfer, if the law had been as settlor thought it was, would have defeated death duties, yet it is admitted that the motive for making the transfer was related entirely to a "beneficent" life motive. His relinquishment of the power, as far as his motive was concerned, is in exactly the same position tax-wise as if in the first instance the transfer had conveyed a completed gift as he intended. That, at least, is the view of both courts below.

Under petitioner's argument, if the settlor had executed the trust on June 15, as he did, and the change in the decisional law had occurred the next day on June 16, and immediately thereafter the settlor had corrected the legal infirmity in the instrument by releasing the power, such relinquishment would have been a transfer "in contemplation of death" regardless of the motive in making the transfer or the settlor's intention to make a completed gift originally.

Under the facts found by the Trial Court in respect to the original motive of settlor and the condition of his health, it seems unreasonable that such a result would follow. Then how can it follow when he does precisely the same thing for precisely the same reason several years later under circumstances in which the Court finds that settlor is actuated by a desire to make the instrument conform to his original intentions? At any rate both Courts below refuse to be a party to such a grotesque and oppressive result.

It has never been the policy of the Congress or the Courts to penalize the correction of errors. In many instances in which the hardship results from statutory barriers, Congress has intervened through legislation and the Courts through judicial decision.

No statutory relief is needed in the case at Bar. Petitioner was free to correct his own error.

Petitioner's argument leads far in all directions and if followed will thwart the will of the Congress. The Congress intended to encourage parents to divide their holdings with their children when such children are in need. With that in view, the Congress made the gift tax rate less than the estate tax rate. The information that these tax rates are different is a matter of general knowledge, and the Congress must have assumed that to be true. The Congress did not intend to subject a transfer to the gift tax and then to an estate tax, where the gift was made for a proper and beneficent purpose. The Congress assumed that when the purpose of the gift was proper that the donor would select the method incurring the lesser of the two taxes. The argument of petitioner leads to the conclusion that a conscious knowledge of the tax saving makes the gift as a matter of law "in contemplation of death" regardless of the circumstances under which the gift was made, and regardless of the inducing life motive of the donor in making the gift. Under petitioner's argument, the gift is in contemplation of death even though the compelling and inducing motive is the desire of settlor to assist his needy children, and he purposely and intentionally adopted the method that will lessen rather than to enlarge his tax, and even though the tax purpose is collateral and incidental and in no sense is an inducing motive to make the gift.

If that is petitioner's position, then all gifts inter vivos are in jeopardy, and the clear and wholesome purposes of Congress are defeated.

If petitioner's argument does not go that far, then it follows that proof of the tax purpose is not conclusive, that a gift or release of a power is "made in contemplation of death" and that that purpose must be looked at in the light of all other relevant factors.

The defect in petitioner's argument consists in the fact that the desire to lessen taxes is merely an evidentiary fact

that must be considered along with other relevant facts in determining whether or not the settlor was in that state of mind that falls within the statutory term "in contemplation of death." Petitioner's argument fails to recognize that the weight of proof of the tax purpose depends upon the relative importance of other relevant factors. Petitioner's argument fails to recognize that under one set of circumstances the proof of the tax purpose may be controlling when under another set it may have little if any weight. Petitioner seeks an adjudication by this Court to the effect that the proof of the tax purpose, regardless of how incidental or collateral that purpose may be to the transaction, is tantamount to proof of contemplation of death. In this position, petitioner goes far beyond the authorities cited and relied upon. In *Kroger v. Commissioner*, 145 F. (2d) 901, relied on by petitioner, the transfer was held to be in contemplation of death, although the Court expressly found that the transfer was not dictated by tax motive, and that the settlors were in good health. The case illustrates the fact that the tax motive is merely one of many evidentiary facts which should be considered by the trior in determining the ultimate factual question of whether the transfer is "in contemplation of death."

PETITIONER'S POSITION NOT SUSTAINED BY AUTHORITIES.

Petitioner seeks reversal of the case at bar, although the question involved is a factual one, upon the authority of *Farmers Loan & Trust Company v. Bowers*, 68 F. (2d) 916, 98 F. (2d) 794, and *First Trust & Deposit Company v. Shaughnessy*, 134 F. (2d) 940. Petitioner also contends that *Denniston v. Commissioner*, 106 F. (2d) 925 (C. C. A. 3d) is overruled by *Commonwealth Trust Company of Pittsburgh v. Driscoll*, 137 F. (2d) 653 (C. C. A. 3d). Petitioner's position regarding all of these cases overlooks the difference in the factual basis upon which the several cases were decided.

In order to determine how far all or any of those cases are helpful or controlling, it is necessary to look at the controlling facts in each case.

When *Farmers Loan & Trust Company v. Bowers*, 68 F. (2d) 917, was first before the Court, the controlling facts were set out in great detail and that case cannot be properly understood unless the facts are carefully examined.

The *Bowers case, supra*, is the foundation for petitioner's argument, and in every material point the facts in the *Bowers case, supra*, and the case at bar differ.

In the *Bowers* case, Mr. Astor, the settlor, had no "beneficent" life motive. In the case at bar, Mr. Spalding, the settlor, made the transfer to assist his children who were in financial need—a "beneficent" life motive.

In the *Bowers* case, Mr. Astor, the settlor, transferred practically all of his remaining wealth to his children, amounting to some forty-six million dollars. Within a few years prior to that transfer, he had made gifts to his children to the extent of some forty-seven million dollars. In the case at bar, Mr. Spalding, the settlor, made gifts to his children in moderate amounts and in each instance the amount of the gift was measured by the financial need of the child at the time the gift was made.

In the *Bowers* case, Mr. Astor reserved a life annuity of $150,000 for himself; in the case at bar, Mr. Spalding reserved nothing to himself.

In the *Bowers* case, the bulk of Mr. Astor's remaining fortune was involved in the transfers; in the case at bar, the bulk of Mr. Spalding's fortune was retained in his estate and was subject to estate taxes.

In the *Bowers* case, Mr. Astor, the settlor, was not in good health, was suffering from a serious disease, and was under the constant care of physicians; in the case at bar, Mr. Spalding, the settlor, was in excellent health, was actively engaged in charitable, civic, and political affairs and was traveling thousands of miles in his automobile.

In the *Bowers* case, a substantial inducing motive with Mr. Astor, the settlor, was to evade estate taxes. In the case at bar, the inducing motive of Mr. Spalding, the settlor, to make the transfer was the desire to aid his children who were in financial distress, and at the same time the transfer was made, he intended to make to his children absolute and completed gifts. His motive in making the release and surrendering the power was to give that legal effect to the instrument originally intended.

In the *Bowers* case, the transfer was made by Mr. Astor, the settlor, as a substitute for his will, and his attorney wrote "His idea is to anticipate the provisions of his will, to some extent . . .."

In the *Bowers* case, the plantiff in an attempt to overcome the presumption in favor of the assessment relied on proof that other inducing motives to make the transfer aside from the escape of death duties was the desire to lessen the income taxes and escape a possible capital levy; in the case at bar, the plaintiff to overcome presumption in favor of the assessment relied on the "beneficent" life motive of settlor to help his children, his good health, and that in amending the transfer he gave to the instrument the legal effect he originally intended and thought it already had.

In the *Bowers* case, all the facts enumerated above were considered relevant by the Court and were given weight in determining whether the transfer was a substitute for testamentary disposition; in the case at bar, likewise all the facts enumerated above were considered by the Trial Court to determine whether the transfer should be considered as a testamentary disposition. Under these different and distinguishing facts, petitioner is undertaking to have this Court to hold as a matter of law that the Trial Court in the case at bar must find the same verdict as was found by the jury in the *Bowers* case. Petitioner would take away from the Trial Court, sitting as a jury in the

case at bar, the right to determine the factual question involved upon the basis of the facts in that particular case.

First Trust & Deposit Company v. Shaughnessy, 134 F. (2d) 940, 942, relied on by petitioner, is likewise distinguishable upon the facts. In this case, the Court held that the transfer was a substitute for testamentary disposition. According to the Court, "This would have been equally true if Ballard had lived for fifteen years; it would have been equally true if he had not intended to avoid estate tax. He would have given her property which he intended to be unavailable for any beneficial purpose until after his death and to become the equivalent of a bequest thereafter."

The transfer in that case involved life insurance policies which were realizable and distributable after settlor's death. The Court's decision was grounded upon the fact that the transfer was not motivated by any beneficent life purpose, and that the benefits of the transfer were realizable only after death. The transfer was motivated by a desire to evade taxes.

Petitioner contends that *Denniston v. Commissioner,* 106 F. (2d) 925 is in conflict with *Farmers Loan & Trust Co. v. Bowers,* 68 F. (2d) 916, (98 F. (2d) 794) and is overruled by *Commonwealth Trust Company of Pittsburgh v. Driscoll,* 137 F. (2d) 653. All of these cases are grounded upon the decision of this Court in *United States v. Wells,* 283 U. S. 102.

The *Denniston case, supra,* is not in conflict with the *Bowers* case nor is it overruled by the *Driscoll* case. The difference in the cases is not found in any statement of the law but in the relative weight that was given to facts under varying circumstances.

In the *Denniston* case the settlor released a power in 1932 that she had retained in a revocable trust created in 1915. The Board of Tax Appeals reached the conclusion that the relinquishment of the power was made "in contemplation of death" because the dominant and controlling

motive for the relinquishment was the decedent's desire to save her estate the burden of death taxes.

In reversing the Board, the Court said:

> "We think that the petitioners adequately overcame the presumption in favor of the Commissioner's ruling by the uncontradicted evidence that the policy of the deceased was to divide her estate equally among her children as is shown by the trust deed executed by her nineteen years prior to her death; that at the time of the 1932 transfers she was a vigorous, robust woman with better than average health for one of her age; and that she was planning her activities for the future without any fear of failing health or impending death."

The Court rests its decision in that case upon two facts that were given no weight by the Board and the Commissioners: (1) that many years prior to the release of the power the decedent had indicated her intention to divide her property among her children by the execution of the deed of trust on May 19, 1915; and, (2) that at the time she released the power she was 'in reasonably good health for one of her age.'

The release of the power in the *Denniston case, supra*, was the consummation of settlor's original intention to make a gift to her children prior to her death. That purpose constituted a "beneficent" life motive. In view of that life motive and the good health of the decedent, the Circuit Court of Appeals reached the conclusion that the donor could use "a method which she thinks is best calculated to save death taxes" and "not thereby conclusively stamp" the transaction as "in contemplation of death."

The original donative motive, although it was manifest by acts that had occurred many years before, together with the good health of the settlor, stamped the transaction in the opinion of the Circuit Court of Appeals as not "a substitute for a testamentary disposition."

In the *Bowers case, supra,* no "beneficent" motive existed. The lack of that motive constituted a controlling factor in the eyes of the Court. As was said by the Court when the case was first before it: *Farmers Loan & Trust Co. v. Bowers,* 68 F. (2d) 916, 923, 924:

> "In the case of such a gift *inter vivos,* specific motives, such as generosity or a desire to see children independent are present and sufficient to actuate the donor. To characterize a gift as such, it is not necessary that there may be any reference to the contemplation of continued life. Indeed the donor may not think about continued life but may assume it *.* *. But in the case of a testamentary disposition, including gifts in contemplation of death, the psychological or mental state of one disposing of property is entirely different from that of one making an inter vivos gift."

In the *Denniston case, supra,* the Court found a life motive to exist for making the gift, whereas in the *Bowers* case the Court held that the gift was without a "beneficent" life motive.

Under these varying facts the Court in the *Denniston* case concluded that the mental state of the one making the gift was that of a person desiring to make an "*inter vivos* gift", whereas in the *Bowers case, supra,* the Court held that the mental state of the testator was that of one desiring to make "a testamentary disposition" of his property. Both conclusions were based on substantial evidence.

In the *Denniston case, supra,* the Court looked to the prior plan of the settlor in testing the question as to whether the particular act was done "in contemplation of death." But when the life motive is the inducing motive for the transfer, the settlor can adopt the method that will lessen taxes. Nothing in the *Bowers* case is to the contrary and the implications of the decision in the *Bowers* case support the *Denniston* case. In fact, it is a general rule that where the transaction is otherwise permissible, the tax-

payer can choose the method to lessen taxes, without thereby generating a tax. *Chisholm v. Commissioner*, 79 F. (2) 14; *Gregory v. Helvering*, 293 U. S. 465, 469.

In *Commonwealth Trust Company of Pittsburgh v. Driscoll*, 50 F. Supp. 949, 950, 951 (affirmed on the opinion below 137 F. (2) 653) the transfer was lacking in a life motive. The Court said:

> "There is no evidence as to the reason these transfers were made to the decedent's wife. * * * At no time did he discuss with business associates or relatives, so far as the evidence in this case shows, the reason or motive for making the transfer of this real estate from himself and his wife as tenants by entirety to his wife alone."

In that case, plaintiff contended that the life motive consisted of the family tradition that the title to the family homestead be held by the wife. The Trial Court found expressly against that contention.

The assessment had the presumption of correctness and the Trial Court held "that burden the plaintiff has failed to sustain." In that case the settlor was in good health but eighty years old at the time of the transfer.

That case comes to this: that the finding by the Trial Court that plaintiff had failed to carry the burden will not be disturbed where the settlor was eighty years old, in good health and made the transfer without proof of any life motive and the life motive attributed to the transfer turned out to be false. The absence of proof of the life motive in the *Driscoll case, supra*, justified the finding by the Trial Court that plaintiff had failed to sustain the burden. That case does not conflict with the *Denniston case, supra*, where a "beneficent" life motive was expressly found.

All the cases turn on the interpretation of different facts under varying circumstances, or the different weight given to the same facts where other relevant associated facts vary. The effort of petitioner is to deny to the triors

of the facts the right to determine in particular case their relative weight or value.

The proposition that the same fact may have more or less weight, depending upon other relevant associated facts, is recognized in all the decisions. The tax motive may or may not be evidence that the gift was made in contemplation of death, just as any other factors may or may not be evidence of that fact, in determining the ultimate question. *Farmers Loan & Trust Company v. Bowers*, 98 F. (2d) 794, 798, 799. Under some circumstances, it may be controlling evidence of the ultimate facts. In other circumstances, it is entitled to little or no weight in determining the ultimate facts. In some instances the inducing motive to make the transfer is due entirely to a "beneficent" life motive, yet settlor may intelligently select a method that will escape estate taxes. Under such circumstances, the tax purpose is collateral and is without any or slight evidentiary significance in determining the ultimate question.

In other instances, the motive of escaping taxes may be a sufficient evidentiary fact to be controlling in determining the ultimate fact.

The function of weighing the evidentiary facts in the particular setting in order to reach the ultimate factual decision rests upon the Trial Court or the jury, as the case may be, and should not be usurped by the reviewing Court.

CONCLUSION.

While the legal effect of the relinquishment of the power was to take the trust property out of the estate of settlor, yet that was also the effect of the original instrument as drawn under the law as then interpreted. The Congress intends that parents help their children by making gifts to them to relieve their necessities, and encourages parents to do so by fixing the Gift Tax Rate just three-fourths of the Estate Tax Rate. Petitioner seeks a judicial construction of the statute, that defeats the will of the Congress, and that leads to the conclusion that every

relinquishment of a power in a trust as a matter of law is "in contemplation of death" because the inevitable legal result of the relinquishment is to defeat the estate tax. If the Congress had so intended, the Congress would have said so in plain language.

The problem simplifies when it is recalled that the motive to escape death duties is merely one of many evidentiary facts, which must be weighed by the Trial Court in determining the ultimate question of whether the transfer was in fact motivated by donative intent or by desire to make a substitute for a testamentary disposition. Paraphrasing the language in the *Dobson case, supra*, "The error of petitioner consists in treating as a rule of law what we think is only a question of fact."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 289.—October Term, 1945.

Marion H. Allen, Collector of Internal Revenue, Petitioner, *vs.* Trust Company of Georgia and Hughes Spalding, Executors of the Estate of Jack J. Spalding, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 28, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

The decedent, Jack J. Spalding, died December 8, 1938, at the age of 82. In 1925 he established two spendthrift trusts—one for his daughter Suzanne and one for his son Jack—and transferred to each trust securities of the value of $50,000. In 1934 he added securities to each trust. He paid gift taxes on these transfers. When he died, the Commissioner included the corpus of each trust in his estate and collected the estate tax on it. The executors brought this suit for a refund. The District Court found that the trusts were established under the following circumstances.

Suzanne and her husband, before 1925, had engaged in a business venture which had ended in disaster. Both had lost all their property and were heavily indebted. Suzanne's husband was without means to support her and their five children. Jack likewise had engaged in an unsuccessful business venture. He was not earning enough to support his family. The gifts were made by the decedent to relieve the needs and to make secure the maintenance of his children and the education and support of his grandchildren. The gifts were placed in trust because Suzanne and Jack had lost prior gifts in unsuccessful projects. The decedent desired to protect them against their own business misadventures and not to retain any benefit, directly or indirectly, to himself. He made the gifts to meet their necessities and desired to set aside the trust property, freed from all claims, tax or otherwise. The decedent, however, retained under the trusts a power to amend

with the consent of the trustee and beneficiary.[1] At the time the trusts were established in 1925 and enlarged in 1934 he believed that the gifts were complete and absolute and intended them to be such. He was a lawyer and believed that under the federal law the reservation of such a power to amend would not require the inclusion in his gross estate at his death of the value of the corpus of each trust. But in 1935 *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, was decided, holding that the reservation of a power to amend brought the corpus of the trust into the settlor's estate, even though the power could not be exercised by the settlor alone. Upon being advised in 1937 that the gifts remained a part of his estate for estate tax purposes, decedent executed an instrument renouncing the power to amend the trusts. This was done so that the trusts would not be a part of his estate for estate tax purposes. At that time, as well as in 1925 and 1934, the decedent was in average good health for a man of his age. He released the power to amend so as to put the trusts in the condition he had thought they were in when he made them. The release was designed to carry out his original purpose in setting aside the property freed from all claims, tax or otherwise. In 1925, 1934, and 1937, he did not entertain thoughts of death except the general expectation of death that all entertain.

The District Court concluded that neither the establishment or the enlargement of the trusts, nor the release of the power to amend was made in contemplation of death. Accordingly, it rendered judgment for respondents. 55 F. Supp. 269. The Circuit Court of Appeals sustained the findings of the District Court and affirmed the judgment. 149 F. 2d 120. The case is here on a petition for a writ of certiorari which we granted because of an apparent conflict between that decision and cases from other circuits.[2]

[1] "During my life, by the unanimous consent of the said trustee, my said daughter [son] and of myself, the terms of this agreement may be amended, changed, enlarged or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked."

[2] Cf. Farmers' Loan & Trust Co. v. Bowers, 68 F. 2d 916; Farmers' Loan & Trust Co. v. Bowers, 98 F. 2d 794; First Trust & Deposit Co. v. Shaughnessy, 134 F. 2d 940; Commonwealth Trust Co. v. Driscoll, 50 F. Supp. 949, aff'd 137 F. 2d 653. And see Pavenstedt, Taxation of Transfers in Contemplation of Death, 54 Yale L. Journ. 70; Harriss, Gift Taxation in the United States (1940) ch. II.

It is clear that the corpus of each trust was properly included in decedent's gross estate if he released the power to amend in contemplation of his death.[3] And there is a presumption that he did so because the release was made less than two years before his death.[4]

It was said in *United States* v. *Wells*, 283 U. S. 102, 117, that a gift is made in contemplation of death within the meaning of the estate tax law if "the motive which induces" it is "of the sort which leads to testamentary disposition." Petitioner's argument is that a purpose to avoid the estate tax is such a motive. It is a motive which would cause a decedent to make an *inter vivos* transfer rather than a will. Since the purpose of the contempla-

[3] Sec. 302(d)(1) of the Revenue Act of 1926, 44 Stat. 9, as amended by § 401 of the Revenue Act of 1934, 48 Stat. 680, reads as follows:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(d)(1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Article 16 of Treasury Regulations 80 (1937 ed.) as amended by T. D. 4966, 1940-1 Cum. Bull. 220, provides in part:

"The phrase 'contemplation of death,' as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition."

[4] Sec. 302(d)(3) provides:

"The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

tion of death provision was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (*United States* v. *Wells, supra,* pp. 116-117), the statute is satisfied, it is said, where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution.

That is a correct statement of the governing principle for it presumes the existence of the requisite motive. The transfer is made in contemplation of death if the thought of death is the "impelling cause of the transfer." *City Bank Farmers Trust Co.* v. *McGowan,* 323 U. S. 594, 599. The transfer may be so motivated, even though the decedent had no idea that he was about to die. *United States* v. *Wells, supra,* pp. 117-118. On the other hand, every man making a gift knows that what he gives away today will not be included in his estate when he dies. All such gifts plainly are not made in contemplation of death in the statutory sense. Many gifts, even to those who are the natural and appropriate objects of the donor's bounty, are motivated by "purposes associated with life, rather than with the distribution of property in anticipation of death." *United States* v. *Wells, supra,* p. 118. Those motives cover a wide range. See 1 Paul, Federal Estate & Gift Taxation (1942) §§ 6.09 *et seq.* "There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death." *United States* v. *Wells, supra,* p. 119. Whether such a desire was the dominant, controlling or impelling motive is a question of fact in each case. We do not have here the type of problem presented in *McCaughn* v. *Real Estate Land T. & T. Co.,* 297 U. S. 606, where the appellate court undertook to reverse the trial court on a review of the evidence. Here two courts have resolved that question of fact in favor of respondents. They have found, as we have said, that Mr. Spalding established the trusts to meet the necessities of his children by giving them property, freed of all claims, tax or otherwise; and that in 1937 he released the power to amend to accomplish the purpose which he originally had, but which he later discovered had not been achieved. Those findings are sufficient to oversome the statutory presumption that the gifts, being made within two years of Mr. Spalding's death, were made in contemplation of death. Those findings, being concurrent find-

ings of the two lower courts, will be accepted here without re-examination of the evidence. See *United States* v. *O'Donnell*, 303 U. S. 501, 508, and cases cited.

It is said, however, that those findings rest on a misconception of the law, since admittedly the decedent in 1937 released the power to amend so as to avoid paying an estate tax on the property included under the trusts. But that is to isolate the release from all that preceded and to treat it as a wholly independent transaction. This is not a case where a settlor, having made one plan for the disposition of his property, later makes a different one to avoid death taxes. Mr. Spalding, in making the release, did what he originally intended to do—to make complete and absolute gifts to his children, freed of all claims, including taxes. Retention of the power to amend would have brought the trust property into Mr. Spalding's estate and subjected it to the estate tax lien.[5] His purpose to take care of his children, come what may, might thus have been thwarted or impaired. He guessed wrong on the law, when he retained the power to amend. When he rectified the error, he was in good faith, endeavoring to complete his original project, not to give his children more than he at first intended in order to save taxes. What he did in 1937 was merely to accomplish by an additional step what he assumed he had already done. The findings make plain that the establishment of the trusts in 1925, their enlargement in 1934, and the release of the power to amend in 1937 were parts of one integrated transaction. That is a finding of fact which we are not at liberty to disturb on this record. On these facts, his desire to avoid death taxes does no more than establish that he did not want his plan to underwrite the necessities of his children and grandchildren jeopardized. His desire to make adequate provision for them remained the dominant motive, or so the triers of fact could properly find.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[5] See Int. Rev. Code § 2058, 53 Stat. 128; 26 U. S. C. § 827. It was held in Higley v. Commissioner, 69 F. 2d 160, that the personal liability of transferees did not extend to the beneficiaries under a trust.

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